

No. 16536 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH and
RUTH SMITH,

Appellees.

Transcript of Record

FILED

OCT 19 1959

Appeal from the United States District Court for the
District of Arizona

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

MOORE and ROMLEY,
JARRILL F. KAPLAN,
411 N. Central Ave.,
Phoenix, Arizona,

Attorneys for Appellants.

JACK CAVNESS,
SCOTT, CAVNESS and YANKEE,
510 Luhrs Tower,
Phoenix, Arizona,

Attorneys for Appellees
Harold L. Smith, Ruth M. Smith and
Ronald M. Smith.

GORODEZKY, MITCHELL and STUART,
733 First National Bank Bldg.,
Phoenix, Arizona,

Attorneys for Appellees
Roscoe B. Smith and
Ida Smith.

In the District Court of the United States
For the District of Arizona

No. Civ. 2675 Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a SWAN CLEANERS; RONALD G.
CALLAHAN, a Minor; HAROLD L. SMITH
and RUTH M. SMITH, His Wife; RONALD
M. SMITH, a Minor; JOHN DOE, JANE
DOE and BLACK CORPORATION,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

For its claim against defendants above named
plaintiff alleges:

I.

At all times herein mentioned:

(a) Plaintiff United States Fidelity and Guar-
anty Company (hereinafter called the "insurer")
was and it now is a corporation duly organized and
existing under the laws of the State of Maryland
and authorized to transact its corporate business as
a liability insurer within the State of Arizona.

(b) Defendants Roscoe B. Smith and Ida Smith
(hereinafter called the "insureds") were and they

now are husband and wife, d/b/a Swan Cleaners, and citizens and residents of the State of Arizona.

(c) Defendant Ronald G. Callahan was and he now is a citizen and resident of the State of California.

(d) Defendants Harold L. Smith and Ruth M. Smith were and they now are husband and wife and the parents of Ronald M. Smith, and all of said defendants were and they now are citizens and residents of the State of Arizona.

(e) The names John Doe, Jane Doe and Black Corporation are fictitious; the true names and citizenship of these defendants are unknown to the plaintiff. Plaintiff asks leave of this Court to substitute the true names of these defendants when the same shall hereafter become known.

II.

The amount in controversy herein exceeds the sum of \$3,000.00 exclusive of interest and costs in that:

(a) The policy of insurance, hereinafter more particularly described, which the insurer issued to the insureds contains coverage limits in excess of \$3,000.00.

(b) Plaintiff is informed and believes and upon such information and belief alleges that defendants Harold L. Smith, Ruth M. Smith, John Doe, Jane Doe and Black Corporation intend to file claims in excess of \$3,000.00 for damages on account of per-

sonal injuries sustained by defendant Ronald M. Smith.

III.

On or about March 8, 1957, the insurer issued and delivered to the insureds a comprehensive general-automobile liability insurance policy, No. CLP 38913, for the period of one year commencing March 8, 1957. Said policy was made to apply to a 1950 Willys station wagon (hereinafter called the "insured automobile") bearing motor or serial No. P 14709, belonging to and owned by defendants Roscoe B. Smith and Ida Smith, his wife. By the terms of the aforesaid policy the insurer agreed, insofar as pertinent to this claim, as follows:

1. To pay on behalf of the insureds all sums which the insureds shall become legally obligated to pay as damages because of bodily injury, sickness or disease, sustained by any person and caused by accident.

2. With respect to the aforesaid insurance, to defend any suit against the insureds alleging such injury, sickness or disease and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

3. The aforesaid insurance shall apply to the insureds or to any person using the insured automobile with the permission of the insureds.

IV.

At approximately 6:30 a.m. on March 28, 1957, defendant Ronald G. Callahan was driving the in-

sured automobile in a westerly direction on U. S. Highway 60-70 near Mile Post No. 182.4 approximately $2\frac{1}{4}$ miles east of Mesa, Arizona, and defendant Ronald M. Smith was riding therein as a passenger. At said time and place an accident occurred as a result of which defendant Ronald M. Smith sustained bodily injuries. The exact nature, character and extent of said injuries are unknown to plaintiff.

V.

At the time of the aforesaid accident defendant Ronald G. Callahan was not an agent or servant of the insureds and did not have authority or permission from the insureds to use the aforesaid insured automobile; said defendant occupied no legal relationship with the insureds which could in any way subject the insureds to liability for said accident; and the insureds are not in any way liable or responsible for said accident.

VI.

By reason of the facts hereinabove alleged there exists no duty or legal obligation on the part of the insurer to defend any suit against the insureds and Ronald G. Callahan, or any of them, seeking damages on account of the bodily injuries arising out of the accident as described in Paragraph IV of this complaint; and there exists no duty or legal obligation on the part of the insurer to pay any sum for or in satisfaction of any judgment obtained by defendants Harold L. Smith, Ruth M. Smith, Ron-

ald M. Smith, John Doe, Jane Doe and Black Corporation, or any of them, against the insureds and Ronald G. Callahan, or any of them, for damages caused or bodily injuries sustained by reason of the accident described above in Paragraph IV.

VII.

The defendants above named claim and in the future will claim, and the plaintiff admits, that the above-numbered policy was in full force and effect on the date of the aforesaid accident. The defendants above named claim and in the future will claim, but plaintiff denies, that said policy extended or afforded coverage to the insureds and defendant Ronald G. Callahan, or either or any of them, while defendant Ronald G. Callahan was driving the insured automobile as aforesaid, and that as a consequence the insurer is legally obligated to pay within the limits specified in said policy damages because of the bodily injuries sustained by defendant Ronald M. Smith and to defend any suit or suits which may be filed seeking damages on account thereof.

VIII.

An actual controversy exists between plaintiff and defendants depending for its determination upon a proper construction and interpretation of the comprehensive general-automobile liability insurance policy described above in Paragraph III.

Wherefore, plaintiff prays that the court adjudge and decree:

1. That under the comprehensive general-automobile liability insurance policy No. CLP 38913 described above in Paragraph III no coverage is extended or afforded to defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, in connection with the automobile accident described in Paragraph IV.

2. That plaintiff is not legally obligated to defend any suit against the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, seeking to recover damages or bodily injuries arising out of the accident above described in Paragraph IV.

3. That plaintiff is not obligated to pay any judgment which defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, John Doe, Jane Doe and Black Corporation, or any of them, may obtain against defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, arising out of the accident above described in Paragraph IV.

4. That defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, John Doe, Jane Doe and Black Corporation, and each of them, be restrained and enjoined from instituting and maintaining any action for or on account of any injuries or damages sustained in the accident above described in Paragraph IV in any court whatsoever.

5. That plaintiff have and recover its costs herein incurred together with such other and fur-

ther relief as to the court shall appear meet and proper in the premises.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed June 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants, Roscoe B. Smith, Ida Smith, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, and Ronald M. Smith, by and through their attorney, Wm. P. Lutfy, and for their answer to plaintiff's Complaint, admit, deny and allege:

I.

Defendants admit the allegations contained in paragraphs I, II, III and IV.

II.

Defendants deny the allegations contained in paragraph V and in this connection allege that the defendant Ronald G. Callahan was using insureds' automobile with the permission and authority of the defendant Roscoe B. Smith and that the plaintiff is liable for the injuries and damages sustained by the defendants Harold L. Smith and Ruth M.

Smith and their minor son, Ronald M. Smith, at the time insureds' automobile was being driven by the defendant Ronald G. Callahan which was involved in an accident resulting in serious injuries to the defendant Ronald M. Smith.

III.

Defendants deny all of the allegations contained in paragraph VI.

IV.

Defendants admit that said policy of insurance issued by the plaintiff to the defendants Roscoe B. Smith and Ida Smith d/b/a Swan Cleaners was in full force and effect at the time the automobile covered thereunder was involved in an automobile accident injuring the defendant Ronald M. Smith.

Further answering said paragraph VII defendants admit that they claim that said policy extended or afforded coverage to the insureds and defendant Ronald G. Callahan, or either or any of them, while defendant Ronald G. Callahan was driving the insured automobile as aforesaid, and that as a consequence the insurer is legally obligated to pay within the limits specified in said policy damages because of the bodily injuries sustained by defendant Ronald M. Smith and to defend any suit or suits which may be filed seeking damages on account thereof.

V.

Defendants admit the allegations contained in paragraph VIII.

VI.

Further answering said Complaint and as a matter of affirmative defense thereto, defendants allege that plaintiffs' Complaint does not state facts sufficient to constitute a cause of action against the defendants upon which relief can be granted.

Wherefore having fully answered plaintiff's Complaint, defendants pray that plaintiff take nothing by reason thereof and that they have Judgment against the plaintiff for their costs.

/s/ WM. P. LUTFY,

Attorney for the Defendants, Roscoe B. Smith, Ida Smith, Harold L. Smith, Ruth M. Smith and Ronald M. Smith.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
RONALD G. CALLAHAN

Comes now Ronald G. Callahan, one of the defendants in the above-entitled cause, and for his Answer to plaintiff's Complaint, admits, denies and alleges:

I.

Defendant admits the allegations contained in paragraph I.

II.

Defendant has no knowledge as to the matters and things alleged in paragraphs II and III of plaintiff's Complaint and therefore demands strict proof of the same.

III.

Defendant admits the allegations contained in paragraph IV of plaintiff's Complaint.

IV.

Defendant denies the allegations contained in paragraph V of plaintiff's Complaint and in this connection defendant alleges that he was driving said automobile with the consent and permission of the defendant Roscoe B. Smith.

V.

Defendant admits the allegations contained in paragraph VII of plaintiff's Complaint.

VI.

Defendant has no knowledge as to the matters and things alleged in paragraph VIII and therefore denies the same.

VII.

Further answering said Complaint, defendant alleges that he is a minor under twenty-one years of age and requests the Court to appoint some fit and proper person as Guardian ad Litem for the purpose of defending him in the above-entitled cause.

Wherefore defendant having fully answered plaintiff's Complaint prays:

1. That plaintiff take nothing by reason thereof.
2. That the Court appoint some fit and proper person as Guardian ad Litem to defend the defendant in the above-entitled cause.
3. For his costs.

/s/ RONALD G. CALLAHAN,
Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 28, 1957.

[Title of District Court and Cause.]

STIPULATION, CONSENT AND ORDER
APPOINTING GUARDIAN AD LITEM

It Is Hereby Stipulated by and between Moore & Romley, attorneys for the plaintiff, and Wm. P. Lutfy, attorney for the defendants, Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, John Doe, Jane Doe, and Black Corporation, that the Court may enter an order appointing Dan Cracchiolo guardian ad litem for the defendant, Ronald Callahan, for the pur-

pose of defending the said Ronald Callahan in the above-entitled cause.

Dated at Phoenix, Arizona, this 10th day of September, 1957.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for the Plaintiff.

/s/ WM. P. LUTFY,
Attorney for the Defendants.

Comes now Dan Cracchiolo and consents to act as guardian ad litem for the defendant, Ronald Callahan, for the purpose of defending the said Ronald Callahan in the above-entitled cause

Dated at Phoenix, Arizona, this 10th day of September, 1957.

/s/ DAN CRACCHIOLO.

Order upon the written stipulation of the attorneys for the plaintiff and the defendants, Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, John Doe, Jane Doe, and Black Corporation, and the consent of Dan Cracchiolo be and he is hereby appointed guardian ad litem for the defendant, Ronald Callahan, for the purpose of defending said defendant in the above-entitled cause.

Done in Open Court and dated at Phoenix, Arizona, this 12th day of September, 1957.

/s/ DAVE LING,

Judge of the District Court of the United States
in and for the District of Arizona.

[Endorsed]: Filed September 12, 1957.

[Title of District Court and Cause.]

COUNTERCLAIM OF THE DEFENDANTS
HAROLD L. SMITH, RUTH M. SMITH,
His Wife, and RONALD M. SMITH

The defendants Harold L. Smith, Ruth M. Smith, his wife, and Ronald M. Smith, for their counterclaim against the plaintiff, United States Fidelity and Guaranty Company, a Corporation, allege:

I.

On or about the 8th day of March, 1957, the plaintiff, United States Fidelity and Guaranty Company, a corporation, issued and delivered to the defendants Roscoe B. Smith and Ida Smith, his wife, a certain comprehensive general automobile liability insurance policy, No. CLP 38913, said policy to have effect for a period of one year commencing March 8, 1957. Said policy covered the operation within the terms thereof of a 1950 Willys station wagon, hereinafter called the insured automobile, bearing

Motor or Serial No. P 14709, which said vehicle was owned by Roscoe B. Smith and Ida Smith, his wife. By the terms of the described policy the plaintiff agreed to pay on behalf of the defendant Smith all sums which said defendants shall become legally obligated to pay as damages because of bodily injury, sickness or disease sustained by any person and caused by accident when the described vehicle was being used by the defendants Smith or with their permission. As is more fully set forth in the cross-claim filed in this cause by these counter-claimants and against the defendants Smith and the defendant Ronald Callahan, an accident occurred involving the insured vehicle at a time when said vehicle was being operated by the defendant Callahan with the consent and permission of the defendants Smith.

II.

The plaintiff claims that it is in no wise liable under the terms of its policy of insurance to the defendants Smiths or to these cross-complainants for injuries caused by the negligence of the operator of said insured vehicle at the time of the accident described in said cross-claim notwithstanding the fact that said vehicle was and at said time operated in accordance with the provisions of the policy of insurance described above.

Wherefore, cross-complainants pray:

1. That the policy of insurance described in this cross-complaint extended coverage to the defend-

ants Roscoe B. Smith, Ida Smith, and Ronald Callahan at the time of the accident described in the cross-claim herein, and that the plaintiff is bound to pay and satisfy any judgment which may be obtained by these cross-complainants against the defendants Roscoe B. Smith, Ida Smith, his wife, and Ronald Callahan, or any of them.

THOMAS H. CROAFF,
SCOTT, CAVNESS & YANKEE,

By /s/ JACK C. CAVNESS,
Attorneys for Cross-
Claimants.

[Endorsed]: Filed October 21, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
NOVEMBER 13, 1958

Honorable Dave W. Ling, United States District
Judge, Presiding.

This case comes on regularly for trial this day. Jarrill F. Kaplan, Esq., appears for the plaintiff. Jack Cavness, Esq., and Thomas J. Croaff, Jr., Esq., appear for the defendants Harold L. Smith, Ruth M. Smith and Ronald Smith. Murray Stuart, Esq., appears for the defendants, Roscoe B. Smith and Ida Smith.

Both sides announce ready for trial.

Plaintiff's Case:

Plaintiff's exhibit 1, Insurance Policy, is admitted in evidence.

Roscoe B. Smith is sworn and cross-examined as an adverse party.

Ronald G. Callahan is called as a witness by counsel for the plaintiff, and fails to respond.

Plaintiff's exhibit 2, Deposition of Ronald G. Callahan, is admitted in evidence.

Harold J. Johnson is sworn and examined on behalf of the plaintiff.

The plaintiff rests.

Jack Cavness, Esq., on behalf of the defendants moves for judgment against the plaintiff. The Court reserves ruling.

Defendants' Case:

Harold Smith is sworn and examined in his own behalf.

The defendants, Harold L. Smith, Ruth M. Smith and Ronald Smith rest.

The defendants, Roscoe B. Smith and Ida Smith rest, and counsel for said defendants asks and is granted leave to introduce evidence at a later date as to attorney's fees.

Both sides rest.

It Is Ordered that the record show this case is submitted subject to the filing of briefs; that the plaintiff is allowed 20 days to file brief and the defendants allowed 10 days to answer.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM OF HAROLD L.
SMITH, RUTH M. SMITH AND RONALD
M. SMITH

For its reply to the Counterclaim of Defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith, plaintiff, United States Fidelity and Guaranty Company, alleges:

I.

It admits all of the allegations of Paragraph I with the exception of the allegations contained in the last sentence thereof, and as to the latter, the same are denied.

II.

Plaintiff admits that it claims that it is in no way liable under the terms of its policy of insurance to the defendants Smiths or to counterclaimants for injuries caused by the negligence, if any, of the operator of said insured vehicle at the time of the accident described in the counterclaim, and plaintiff denies the remaining allegations of Paragraph II.

Wherefore, plaintiff prays for judgment in accordance with the prayer of plaintiff's complaint.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 13, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
FEBRUARY 27, 1959

Honorable Dave W. Ling, United States District
Judge, Presiding.

This cause having been submitted and by the
Court taken under advisement,

It Is Ordered that judgment will be entered for
the defendants upon plaintiff's complaint for de-
claratory relief, upon findings to be submitted under
the rules.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW; RE-
QUEST FOR ADDITIONAL FINDINGS
AND CONCLUSIONS; AND REQUEST
FOR HEARING

Objections to Proposed Findings of
Fact and Conclusions

Plaintiff respectfully objects to proposed Finding
of Fact No. 6 insofar as the same finds that de-
fendant Callahan was driving the insured automo-
bile "with the permission of the insureds" for the
following reasons:

1. Said finding is contrary to law.

2. Said finding is contrary to the undisputed evidence.

3. Said finding is contrary to the weight of the evidence.

4. Said finding is vague and indefinite in that the finding fails to state whether Callahan was driving with the "actual" permission of the insureds, or the "implied" permission of the insureds, or whether the finding is merely that Callahan was initially, in the month of January, 1957, given permission to drive the insured automobile.

Plaintiff respectfully objects to proposed Conclusion of Law No. 2 for the following reasons:

1. Said conclusion is contrary to law.

2. Said conclusion is contrary to the undisputed evidence.

3. Said conclusion is contrary to the weight of the evidence.

4. Said conclusion is vague and indefinite in that it is impossible to ascertain therefrom whether the Court concluded:

(a) That Callahan was initially given permission to drive the insured automobile, and therefore he had permission to use the automobile for all purposes; or

(b) That Callahan was using the insured automobile at the time and place of the accident in

question with the “actual” permission of the named insureds; or

(c) That Callahan was using the insured automobile at the time and place of the collision with the “implied” permission of the named insureds.

Request for Additional Findings and Conclusions

Plaintiff respectfully requests the Court to make the following additional findings:

1. That defendant Roscoe B. Smith originally gave defendant Ronald G. Callahan permission to use the insured automobile for transportation to and from work, for use while working for defendant Roscoe B. Smith and for use on errands to the grocery store and drug store.

2. That at the time of the accident on March 28, 1957, Callahan was not using the insured automobile for transportation to or from work; nor was he working nor on any business for the named insureds; nor was he on any errand.

3. That the words “and owned by defendants Roscoe B. Smith and Ida Smith, his wife,” be inserted at the end of Proposed Finding No. 4.

4. That the words “with the permission of the insureds” appearing at the end of Proposed Finding No. 5 be stricken and the following words be substituted in lieu thereof: “provided the actual

use thereof was with the permission of the named insureds.”

5. That the word “with” appearing in the second line of Proposed Finding No. 6 be stricken and the word “without” be substituted in lieu thereof.

6. In the alternative to request No. 6 immediately above, and in the event said request is denied, that the Court find whether Callahan had initial permission, actual permission or implied permission.

7. That the word “extended” appearing in the third line of proposed Conclusion of Law No. 2 be stricken and the words “did not extend” be substituted in lieu thereof.

8. In the alternative to request No. 7 immediately above, and in the event the same is denied by the Court, that the Court conclude whether the defendants are entitled to judgment by reason of the initial permission given to defendant Callahan, or by reason of actual permission to Callahan to use the insured automobile at the time and place of the collision in question, or by reason of implied permission to Callahan to use the insured automobile at the time and place of the collision in question.

Request for Hearing

Plaintiff respectfully requests the Court to fix a date and time for the hearing of the matters con-

tained herein and to advise respective counsel thereof.

Memorandum of Authorities

The foregoing objections and requests are made pursuant to Rule 52(b) Federal Rules of Civil Procedure and also to Rule 21 Rules of Practice, United States District Court for the District of Arizona.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed March 6, 1959.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
APRIL 23, 1959

Honorable Dave W. Ling, United States District
Judge, Presiding.

It Is Ordered that the Proposed Findings of Fact and Conclusions of Law, submitted by defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith, are approved and adopted as the Findings of Fact and Conclusions of Law herein.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on regularly to be heard on the complaint of the plaintiff and the answer and counterclaim of certain of the defendants on the 12th day of November, 1958, before the court sitting without a jury. The plaintiff appeared in person and through its attorneys, Moore & Romley, by Mr. Jarril F. Kaplan; the defendants Roscoe B. Smith and Ida Smith appeared through their attorneys, Gorodesky, Mitchell & Stuart; and the defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith appeared through their attorneys, Scott, Cavness & Yankee and Thomas J. Croaff. Evidence was presented in support of the respective claims of the parties and all of the parties rested. The cause was taken under advisement by the court. Memoranda were filed by the parties and the cause duly submitted for decision. The court having considered the law and the evidence, and being duly advised in the premises, now finds the following:

Findings of Fact

1. The plaintiff is a corporation duly organized and existing under the laws of the State of Maryland, and is authorized to transact business as a liability insurer within the State of Arizona. The defendants Roscoe B. Smith and Ida Smith, his

wife; Harold L. Smith, Ruth M. Smith, his wife, and Ronald M. Smith are citizens and residents of the State of Arizona. The defendant Ronald G. Callahan is a citizen and resident of the State of California.

2. The amount in controversy herein exceeds the sum of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs.

3. On the 8th day of March, 1957, the plaintiff, United States Fidelity and Guaranty Company, a corporation, issued and delivered to the defendants Roscoe B. Smith and Ida Smith, his wife, a comprehensive general automobile liability insurance policy, No. CLP 38913, which policy was by its terms effective for a period of one year commencing March 8, 1957.

4. The policy described in Paragraph 3 hereof covered the operation within the terms of such policy of a 1950 Willys station wagon, bearing motor or serial No. P 14709.

5. The described policy of insurance afforded liability insurance coverage to the named insureds and, in addition thereto, to any person using the insured vehicle with the permission of the insureds.

6. On March 28, 1957, the defendant Ronald G. Callahan was driving the insured automobile with the permission of the insureds, and said automobile was during the operation thereof by Ronald G. Callahan involved in an accident in which the defendant Ronald M. Smith sustained bodily injuries.

Conclusions of Law

From the foregoing findings, the court concludes:

1. Jurisdiction of this action is conferred upon the District Court for the District of Arizona by virtue of the provisions of Title 28, U.S.C. Sec. 2201.

2. At the time of the accident described in the Findings of Fact, the policy of insurance therein described was in full force and effect and extended coverage to the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident.

Let Judgment be entered accordingly.

Dated this 23rd day of April, 1959.

/s/ DAVE W. LING,

Judge of the District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1959.

In the District Court of the United States
For the District of Arizona

No. Civ. 2675—Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a SWAN CLEANERS, RONALD G.
CALLAHAN, a Minor, HAROLD L. SMITH
and RUTH M. SMITH, His Wife, RONALD
M. SMITH, a Minor; JOHN DOE, JANE
DOE and BLACK CORPORATION,

Defendants.

JUDGMENT

The above-entitled and numbered cause came on regularly to be heard on the complaint of the plaintiff and the answer and counterclaim of certain of the defendants on the 12th day of November, 1958, before the court sitting without a jury. The plaintiff appeared in person and through its attorneys, Moore & Romley, by Mr. Jarril F. Kaplan; the defendants Roscoe B. Smith and Ida Smith appeared through their attorneys, Gorodezky, Mitchell & Stuart; and the defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith appeared through their attorneys, Scott, Cavness & Yankee and Thomas J. Croaff. Evidence was presented in support of the respective claims of the parties, and

all of the parties rested. The cause was taken under advisement by the court. Memoranda were filed by the parties and the cause duly submitted for decision. The court having considered the law and the evidence, and being duly advised in the premises, and having made findings of fact and conclusions of law, now, therefore:

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, and Ronald G. Callahan, as follows:

1. That the plaintiff take nothing by its complaint, and that said complaint be dismissed.

2. That at the time of the accident described in the Findings of Fact, the policy of insurance therein described was in full force and effect and extended coverage to the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident.

3. That the defendants have and recover their costs incurred herein.

Settled and approved this 23rd day of April, 1959.

/s/ DAVE W. LING,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged March 3, 1959.

[Endorsed]: Filed and docketed April 23, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States Fidelity and Guaranty Company, plaintiff in the above-entitled action, appeals to the United States Court of Appeals, Ninth Circuit, from the judgment entered in said action on April 23, 1959.

Dated this 19th day of May, 1959.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1959.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That United States Fidelity and Guaranty Company, as principal, and Maryland Casualty Company, as surety, are held and firmly bound, jointly and severally, unto Roscoe B. Smith and Ida Smith, his wife, Ronald G. Callahan, Harold L. Smith and Ruth M. Smith, his wife, and Ronald M. Smith, defendants and Appellees in the above-entitled cause, in the penal sum of Two Hundred Fifty Dollars

(\$250.00) lawful money of the United States of America to be paid to the above-named Appellees, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents:

Sealed with our seals and dated this 19th day of May, 1959.

The condition of the above obligation is such that, Whereas, the above-entitled Court, on April 23, 1959, rendered judgment herein in favor of defendants and against plaintiff, and plaintiff having this day given written notice of appeal to the United States Court of Appeals, Ninth Circuit, from said judgment;

Now Therefore, if plaintiff United States Fidelity and Guaranty Company shall prosecute its appeal to effect and shall well and truly pay the costs if said appeal is dismissed or said order and judgment is affirmed, or such costs as the United States Court of Appeals, Ninth Circuit, may award if said judgment is modified, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00) then this obligation shall be null and void; otherwise to be and remain in full force and effect.

UNITED STATES FIDELITY
and GUARANTY COMPANY,

By /s/ JARRIL F. KAPLAN,
Its Attorney.

[Seal] MARYLAND CASUALTY
 COMPANY,

By /s/ JAMES M. LANDERS,
Its Attorney-In-Fact.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1959.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the Plaintiff's time to file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, is hereby extended to and including July 20, 1959.

Dated this 26th day of June, 1959.

/s/ DAVE W. LING,
Judge, United States District Court for the District
of Arizona.

[Endorsed]: Filed June 26, 1959.

In the United States District Court
for the District of Arizona

No. Civ. 2675

U. S. FIDELITY & GUARANTY CO., a Corp.,
Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
etc., et al.,

Defendants.

HAROLD L. SMITH and RUTH M. SMITH, His
Wife, etc.,

Cross-Complainants and Counter-Claimants,

vs.

ROSCOE B. SMITH, IDA L. SMITH and
DANIEL CRACCHIOLO, etc.,

Cross-Defendants,

U. S. FIDELITY & GUARANTY CO., a Corp.,
Counter-Defendant.

Thursday, November 13, 1958

United States Courthouse—Phoenix, Arizona

Appearances:

MOORE & ROMLEY, by
JARRIL F. KAPLAN,

For U. S. Fidelity & Guaranty Co.

JACK CAVNESS,

THOMAS J. CROAFF, JR.,

For Harold, Ruth & Ronald Smith.

MURRAY H. STUART,

For Roscoe B. Smith and Ida Smith.

PROCEEDINGS

The Clerk: Civil 2675 Phoenix. U. S. Fidelity & Guaranty Co., a corporation, versus Roscoe B. Smith and Ida Smith, his wife, doing business as Swan Cleaners, et al., defendants. For trial.

Mr. Kaplan: Plaintiff ready.

Mr. Cavness: Defendants and Cross-Complainants Harold and Ruth Smith ready.

Mr. Stuart: Roscoe B. and Ida Smith ready.

The Court: You may proceed.

Mr. Kaplan: Before we call our first witness, I might mention, for the record, that the jurisdictional facts have been admitted, and also the fact of the issuance of the policy, and the provisions of the policy, and the existence of the accident in question.

I think first before we proceed, I should like to offer in evidence the Insurance Policy in question, which has a table on it.

The Court: It was introduced at the pretrial conference.

Mr. Kaplan: Is it already in, your Honor? It is just marked for identification.

Mr. Cavness: If it is the same one, it is all right with us.

Mr. Stuart: I have no objection. [2*]

The Court: It may be received.

The Clerk: Defendant's A in evidence.

Mr. Kaplan: You can mark it my exhibit.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(Said Insurance Policy was received in evidence and marked as Plaintiff's Exhibit 1.)

Mr. Stuart: At this time, the defendant, Roscoe B. Smith, in his behalf I ask that the Court make a Memorandum of Findings of Fact and Conclusions of Law.

The Court: When? Now?

Mr. Stuart: I am just asking for findings of fact.

The Court: The Court has to under the Federal Rules. It is obligatory on the Court. The Court has to make Findings of Fact in every civil case in the Federal Court.

Mr. Stuart: All right, your Honor.

The Court: It will be done.

Mr. Cavness: You are a better federal lawyer than I am. I didn't know that. I just found it out.

The Court: All right; call your first witness.

Mr. Kaplan: I call Roscoe B. Smith. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ROSCOE B. SMITH

called as a witness by the Plaintiff, U. S. Fidelity & Guaranty Co., for cross-examination, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Kaplan:

Q. Will you please state your name?

A. R. B. Smith.

Q. Where do you live, Mr. Smith?

A. 2846 North 33rd Street.

Q. What is your wife's name?

A. Ida L. Smith.

Q. What is your business or occupation?

A. Dry cleaning and laundry.

Q. How long have you been engaged in that occupation? A. In Phoenix seven years.

Q. What name do you use in connection with your business? A. Swan Cleaners.

Q. You and your wife own and operate the Swan Cleaners, is that right? A. Yes.

Q. And you use the name Swan Cleaners as your business name? A. Yes, sir. [4]

Q. How long have you operated under the name of Swan Cleaners? A. About seven years.

Q. Calling your attention, Mr. Smith, to the year 1957, and particularly the months January, February and March, did you have occasion during those months to employ your grandson, Ronald Callahan? A. Yes, sir.

Q. Do you recall when you first employed Callahan? A. I believe it was in January.

(Testimony of Roscoe B. Smith.)

Q. January of 1957? A. Yes, sir.

Q. Callahan's home, I believe, is in California, is that right? A. Yes, sir.

Q. He is the son of your daughter, Lois Callahan? A. Yes, sir.

Q. When you hired Ronald, you hired him as a pickup and delivery boy, is that right, sir?

A. Yes, sir.

Q. And in the course of his duties as pickup and delivery boy, he would pick up laundry and dry cleaning from your various agents?

A. Yes, sir.

Q. And then bring it to the plant? [5]

A. Yes, sir.

Q. And after the clothes were dry cleaned, or laundered, he would then return the clothes to the agents, or the customers, is that right?

A. Yes, sir.

Q. And in doing this pickup and delivery work, Ronald Callahan used a 1950 Jeep Station Wagon that you owned, is that right, sir?

A. Yes, sir.

Q. This policy which has been received in evidence as Plaintiff's Exhibit 1 for identification, Mr. Smith, this was the policy of insurance that you purchased and was applicable to that Jeep Station Wagon, is that right, sir?

Mr. Cavness: We will stipulate that that is the case.

The Court: All right.

Mr. Kaplan: Well, it is his policy, and I would

(Testimony of Roscoe B. Smith.)

like him to look it over, your Honor, and acknowledge it.

The Court: All right.

The Witness: Yes, sir.

Q. (By Mr. Kaplan): Mr. Smith, your grandson, Ronald Callahan, came to Arizona from California in January of 1957 for the purpose of going to work for you, isn't that [6] right?

A. Yes, sir.

Q. He did not live with you, did he?

A. For two or three weeks he did.

Q. Two or three weeks in January?

A. Yes, sir.

Q. And then who did he live with?

A. He lived with my son.

Q. Harold L. Smith? A. Yes, sir.

Q. One of the defendants in this action?

A. Yes, sir.

Q. And also his wife, Ruth M. Smith?

A. Yes, sir.

Q. Did he—rather, at the time Ronald Callahan went to work for you in January, and during the month of January, did your son, Harold L. Smith, work for you in your plant?

A. Not at that time.

Q. Where did he work?

A. He operated one of our stores at 4236 North 12th Street.

Q. Are you sure that he was not working in the plant at first, and then later took over that store?

(Testimony of Roscoe B. Smith.)

A. He did work at first in the plant.

Q. Was your son, Harold L. Smith, working in the plant [7] at the same time that Ronald Callahan was working there?

A. It is possible some of the time he could have been, but I don't remember.

Q. At some time, Mr. Smith, during the months of January, February, or March, I believe you told Ronald Callahan that he could take the Jeep Station Wagon home at night to be used as transportation to and from work, is that correct, sir?

A. Yes, sir.

Q. Do you recall when that occurred?

A. Not the exact date, I don't.

Q. Do you know whether it was in January, February, or March?

A. I think it was in January.

Q. You think it was in January?

A. Yes, sir.

Q. When you told Ronald Callahan that he could take the Jeep home, you told him that he could do so for the purpose of having transportation to and from work, is that correct?

A. Yes, sir.

Q. Can you tell the Court what Callahan's hours were when he worked for you?

A. They varied some. He would leave the plant some mornings at 9:00 o'clock. He would make one trip out and [8] get in before noon. Then he would leave again at 3:00, and get in possibly five or five-thirty.

Q. Would it be fair to say, Mr. Smith, that Mr.

(Testimony of Roscoe B. Smith.)

Ronald Callahan had no occasion whatsoever to be doing anything for you, or on behalf of your business, before the hour of 8:30 in the morning, and after the hour of 5:30 in the evening?

A. Sometimes he worked a little later than that if we didn't get the clothes out, sometimes.

Q. Sometimes he worked a little later than 5:30 in the evening?

A. Yes. It varies in our business.

Q. To what hour would he work when he worked late? A. I don't think later than 6:00.

Q. Would it be fair to state that Ronald Callahan at no time during the time he worked for you ever had any occasion to be on any business for you, or working for you in any way before the hours of 8:00 o'clock in the morning, and 7:30 at night? A. That is right.

Q. He never had any occasion to be doing any work for you at 6:00 o'clock in the morning, did he? A. No, sir.

Q. When you gave Ronald Callahan the Jeep and told him he could take it home for the purpose of having transportation [9] to and from work, it was your understanding with Callahan that he was to use the jeep only for that purpose, namely, going to and from work, is that right, sir?

Mr. Cavness: If the Court please, we object to what his understanding was. We want to know what they did.

The Court: Sustain the objection. Ask him what he told him.

(Testimony of Roscoe B. Smith.)

Q. (By Mr. Kaplan): Did you tell Callahan when you gave him the Jeep that he was to use the Jeep only for the purpose of going to and from work, and to run an errand to the grocery store, or to the drug store, or something like that?

Mr. Cavness: That is multifarious. That is too much.

The Court: I think the way to get to it would be to ask him what he told him.

Mr. Cavness: I think so.

Q. (By Mr. Kaplan): What did you tell him, Mr. Smith?

A. Well, I didn't tell him that he couldn't use it, or I didn't tell him he could use it after he went home, because, naturally, he wasn't living with me.

Q. Now, Mr. Smith, did you ever have any understanding through conversation with Mr. Callahan, as to the purpose for your giving him the Jeep?

Mr. Cavness: Same thing, if the Court [10] please.

The Court: Oh, yes.

Mr. Kaplan: Your Honor——

The Court: It doesn't mean anything to the Court. I want to know what people say.

Mr. Kaplan: Yes, your Honor. Maybe I can get at what was said through the use of the word "understanding," because from prior depositions in this action——

The Court: The Court wouldn't pay any atten-

(Testimony of Roscoe B. Smith.)

tion to that. The Court wants to know what he said, then the Court may arrive at an understanding.

Q. (By Mr. Kaplan): I believe you testified awhile ago, Mr. Smith, that you told Callahan he could take the Jeep home, and that he could do that for the purpose of having transportation to and from work? A. Yes, sir.

Q. Did you also tell him that he could use the Jeep for any other purpose? A. No, sir.

The Court: Did you tell him he couldn't?

The Witness: No, sir.

Q. (By Mr. Kaplan): Did you ever have any conversations with Callahan, Mr. Smith, except the ones that you have already related now in regard to what use he was or was not to make of the Jeep? [11] A. No.

Q. You and he never discussed that matter any further? A. No, sir.

Q. The only discussion you had with him was to the effect, "Callahan, I am giving you the Jeep to be used for the purpose of going back and forth to and from work to home"? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, on March 28th, 1957, Ronald Callahan was involved in an automobile accident. Mr. Smith, are you familiar with that accident?

A. Yes, sir.

Q. Where did the accident take place?

A. East of Mesa.

Mr. Cavness: I don't know whether counsel

(Testimony of Roscoe B. Smith.)

wants to know what he has heard, or perhaps would indicate in the record has been told to him.

Mr. Kaplan: I have got the man under cross-examination.

Mr. Cavness: If the Court please, I would like to have the witness instructed to only answer on his personal knowledge, unless Mr. Kaplan says, "I want to know what you have heard," if the man doesn't know anything about the [12] accident. He wasn't there.

Mr. Kaplan: I wasn't going to ask him about the accident, except he knew it happened.

Mr. Cavness: That is what you said, where it happened.

The Court: Go ahead.

Q. (By Mr. Kaplan): Now, Mr. Smith, did you have conversations about this accident with your son, Harold L. Smith, your daughter-in-law, Ruth Smith, Ronald Callahan, Michael Smith, the other defendants in this case?

A. After the accident?

Q. Yes. A. Not very much.

Q. Did you talk to him at all about it?

A. Some, yes, sir.

Q. And also with Ronald Callahan?

Mr. Cavness: I'm not trying to be technical. We don't care if it is hearsay, if it doesn't appear as something that the witness is supposed to know, that's all.

Q. (By Mr. Kaplan): Mr. Smith, did you get this information about this accident from the other

(Testimony of Roscoe B. Smith.)

defendants in this case, Harold Smith, Ruth Smith, Ronald Smith and Ronald Callahan?

A. Can I do some explaining, sir? [13]

Q. Go ahead.

The Court: Yes, go ahead.

The Witness: Well, in a time like that, when they have an accident and they are thrown in a hospital, you don't ask important questions as to how it happened.

Q. (By Mr. Kaplan): Mr. Smith, all I am asking you is did you discuss the accident with your family? A. Not very much.

Q. Did you discuss it with them at all?

A. Some.

Q. All right. Tell us what the discussion was, sir.

A. Well, I was trying to find out how it happened.

Q. What did you find out?

A. I found out that he went to sleep driving, and ran into an abutment of some kind, or a post.

Q. Did you find out where the accident happened? A. East of Mesa.

Q. Did you find out when the accident happened?

A. Early in the morning, around 6:00, 6:30, something like that.

Q. Did you find out what the boys were doing at that time in the morning east of Mesa?

A. No, sir.

Q. Did you find out that Michael Smith was

(Testimony of Roscoe B. Smith.)

in the Jeep with your grandson, Callahan, at the time of the accident? [14] A. Yes, sir.

Q. You don't know what the boys were doing there? A. No, sir.

Q. And you haven't heard? A. I heard.

Mr. Cavness: If the Court please, what he heard is immaterial anyway.

Mr. Kaplan: Not if he heard it from the family. They are parties——

Mr. Cavness: Oh, no.

The Court: If he heard it from Callahan.

Mr. Cavness: We are going to tell them what they were doing. We're not trying to withhold anything.

The Court: I guess we will hear.

Mr. Cavness: Yes; you will hear.

Q. (By Mr. Kaplan): Mr. Smith, let me ask you this: At the time of the accident in question, was Callahan authorized to use your Jeep truck?

A. Not that trip.

Q. And he had no permission to use it at that time? A. No.

Mr. Cavness: Just a moment, if the Court please. Permission is an express or implied thing. I don't know which Mr. Kaplan is talking about. We object. [15]

Mr. Kaplan: The man is a defendant in this case. He is a party opponent.

Mr. Cavness: It is a very material thing.

The Court: The Court will construe the contract.

(Testimony of Roscoe B. Smith.)

Mr. Cavness: But the question construes it. He can ask, Did you give him express permission.

The Court: He answered that. He said No.

Mr. Cavness: He did not. Permission is a broad thing.

Q. (By Mr. Kaplan): I believe you answered the question "No," is that right? A. Yes.

The Court: That's what he said.

Mr. Cavness: That's what he said.

Q. (By Mr. Kaplan): Mr. Smith, did Mr. Callahan at the time of this accident have any occasion whatsoever to be in that area at that time, as part of his work for you? A. No, sir.

Q. Prior to the accident of March 28, 1958, Mr. Smith, had Ronald Callahan, to your knowledge, ever used that Jeep station wagon for any purpose other than to go back and forth to and from work?

A. Some, that I know of.

Q. I believe you knew of two occasions when he did that, is that right, sir? [16]

A. Two, when he stayed with me.

Q. On one occasion—well, on these occasions when he was staying with you, and he used the Jeep for these other purposes, you gave him permission to do so, is that right, sir?

A. Yes, sir.

Q. And I believe that on one occasion Mr. Callahan without your permission took the truck and went to California? A. Yes, sir.

Q. He wasn't staying with you at that time?

A. No, sir.

(Testimony of Roscoe B. Smith.)

Q. At that time he was staying with your son, Harold L. Smith? A. Yes, sir.

Q. Now, aside from the trip to California, do you know of any occasion when Mr. Callahan ever used that Jeep without permission for any purpose other than to go back and forth to and from work?

A. I knew about it when he had the accident.

Q. Aside from that, sir?

A. Well, since he wasn't staying with me, I don't know how much he used it.

Q. Then your answer to my question is you don't know of any such occasion, is that right, sir?

A. Not exactly. [17]

The Court: What do you mean by "not exactly"?

The Witness: Well, they would go to the drug-store, grocery store, or something. Of course, he was staying with my son, you see. I wouldn't see him.

The Court: All right.

Q. (By Mr. Kaplan): Now, before this accident of March 28, 1957, did you ever have any conversations with your son, Harold L. Smith as to what he was or what he was not to do in regard to letting Ronald Callahan use that jeep truck?

A. I had some conversation with him.

Q. You told your son, Harold Smith, that he was to see to it that before Ronald Callahan took that Jeep truck out in the evening to run around,

(Testimony of Roscoe B. Smith.)

he was to first get Harold's permission, isn't that right, sir?

A. Yes, sir; except go to the grocery store.

Q. Except when he was going on an errand?

A. Yes, sir.

Mr. Kaplan: No further questions.

Cross-Examination

By Mr. Cavness:

Q. Mr. Smith, you did not tell this kid he could not use the truck, did you?

A. No, sir. [18]

Q. You didn't tell him anything. You just turned the truck over to him, and he knew what he had to do with it at work, isn't that right?

A. Yes, sir.

Q. And you didn't say anything about what he might do with it afterward, is that right?

A. No, sir.

Q. You knew he went to California, didn't you?

A. I did afterward.

Q. Afterward. You didn't give him permission to go, did you, Mr. Smith?

A. No.

Q. And you didn't reprimand him when he came back for using the truck, did you?

A. No, sir.

Q. As a matter of fact, he brought a daughter of yours back, I believe, did he not?

A. Yes, sir.

(Testimony of Roscoe B. Smith.)

Q. The gasoline was bought at the Signal Service at 6th Street and VanBuren, is that right?

A. Yes; we trade there.

Q. He had the unrestricted right to buy gasoline and other products there, is that right?

A. Yes, sir; for the truck.

Q. Yes; for the truck. I don't mean for anything else. [19] You didn't ever tell him that he could not buy gasoline there? A. No, sir.

Q. As a matter of fact, you knew your bills were running a little higher on that truck than they should run just for ordinary pickup and delivery work that he was doing, didn't you?

A. They ran pretty high.

Q. And you knew therefore that he must be using the truck on the side to go to the show, or wherever he wanted to, didn't you?

Mr. Kaplan: Just a minute, if the Court please. Because of the gas bills——

The Court: Go ahead.

Q. (By Mr. Cavness): Mr. Smith, you know what the ordinary gasoline bill runs, don't you?

A. Yes.

Q. You have been in business for quite some time. You knew these bills were running higher than that which would have been necessary to pick up and deliver laundry and cleaning, didn't you?

A. Yes, sir, but I didn't know for which trucks.

Q. You knew Ronald Callahan signed his own checks, didn't you? [20]

A. Yes, sir, but I didn't know for which trucks.

(Testimony of Roscoe B. Smith.)

Q. You knew Ronald Callahan signed his own checks, didn't you? A. Yes, sir.

Q. You knew his were running higher, didn't you? You knew that, didn't you? A. Yes.

Q. And you never said an adverse word to the kid, did you? A. No, sir.

Q. You didn't say, "You can't use the truck"?

A. No; I didn't.

Q. No; never did. In addition to the time that he went to California, Mr. Smith, you knew that he had used the truck here in town, didn't you?

A. I knew he did some.

Q. Well, as a matter of fact, your son, Bill, back here, Harold, for the record, told you that he had, didn't he? A. Yes, sir.

Q. And you never said, "Don't let that kid do this, that, or the other thing," did you, with that truck?

A. I believe I explained that awhile ago.

Q. You mean that your son was to tell him what to do? A. Yes, sir.

Q. And whatever your son told him was all right was [21] within your permission, is that right? A. That is right.

Q. And what your son told him not to do would perhaps be outside of your permission, is that right? A. Yes.

Mr. Cavness: That is all.

(Testimony of Roscoe B. Smith.)

Further Cross-Examination

By Mr. Kaplan:

Q. Are you meaning to tell the Court, Mr. Smith, that it was perfectly all right with you for Callahan to use that truck for any purpose he saw fit in the evenings to go running around? Is that what you are telling the Court?

Mr. Cavness: No; that isn't what he told the court. He didn't say that at all.

The Witness: I didn't tell the Court that.

Q. (By Mr. Kaplan): Mr. Smith, when I was asking you questions, I asked you if you knew of any occasions when Ronald Callahan ever used that Jeep for any purpose other than to go back and forth to and from work, and you said that when he was staying with you he used the Jeep on two occasions with your permission, so you knew he used it then? A. Yes.

Q. Then you mentioned the one occasion about California, taking the Jeep to California without permission? [22] A. Yes, sir.

Q. Now, sir, I will ask you, do you know of any other occasions, did you know of any other occasions before this accident, now, when Ronald Callahan used that Jeep in the evenings to go running around without permission?

A. I don't know for sure.

Q. I'm not saying what you know now, I am

(Testimony of Roscoe B. Smith.)

saying at the time of this accident, did you know then of any other occasions?

A. Not any particular occasions.

Q. Do you know of any occasions, sir, when he used the Jeep to go running around in the evening without permission from either yourself or your son, Harold?

A. No; I don't really.

Q. And you didn't at the time of the accident?

A. No, sir.

Mr. Kaplan: No further questions.

Further Examination

By Mr. Cavness:

Q. You say you don't know because you didn't see the kid do it, is that right?

A. That is right.

Q. But you had a pretty good idea he was doing it, didn't you? [23]

A. Yes, sir; I did.

Mr. Cavness: That is all.

The Court: That seems to be all, Mr. Smith.

(Witness excused.)

Mr. Kaplan: I call Ronald Callahan.

Mr. Cavness: He is not here.

Mr. Kaplan: We at this time offer in evidence the deposition of Ronald Callahan.

Mr. Cavness: We have no objection.

Mr. Stuart: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Said Deposition of Ronald Callahan was received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Kaplan: Your Honor, I only have one additional witness. I anticipated Mr. Callahan was going to be here this morning, and that I would call him as a witness, and now that his deposition has been received in evidence, I assume the Court will want to read it at its leisure, and I have only the one additional witness. I have sent him a messenger to have him come right over, and I would like to have a short recess at this time until he gets here. It won't take but five minutes.

The Court: All right, the Court will stand at recess. [24]

(Recess.)

The Court: You may continue.

Mr. Kaplan: Your Honor, by way of Offer of Proof, before calling the next witness, we wish to avow to the Court that if the witness were permitted to answer the question which we previously asked him, he would testify, that is, Mr. R. B. Smith, that he would testify that when he turned the Jeep Station Wagon over to Callahan, it was his understanding with Callahan, and Callahan's understanding also, that he was to use the Jeep only for the purpose of going to and from work, and for the purpose of running errands, but that he was not to use the Jeep for the purpose of running around.

Mr. Cavness: We will not accept the offer of proof at all. It is not correct.

Mr. Kaplan: I will avow to the Court that he would so testify on the basis of previous depositions taken in this action.

I call Mr. Harold Johnson. [25]

HAROLD J. JOHNSON

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you state your name, please?

A. Harold J. Johnson.

Q. What is your address and occupation?

A. I live at Mesa, Arizona. I am with the Arizona State Highway Patrol.

Q. Mr. Johnson, in your capacity as a Highway Patrolman, did you have occasion to investigate an accident which occurred on March 28, 1957, involving a Jeep Station Wagon? A. I did.

Q. How many cars were involved in that accident, Officer?

A. There was one car, a 1950 Jeep Station Wagon.

Q. Who was driving the station wagon at the time of the accident, according to your investigation, if you know?

Mr. Cavness: If you know.

The Witness: All I know is what I was told.

Q. (By Mr. Kaplan): All right, sir, we will skip that for a moment, and get back to that later.

(Testimony of Harold J. Johnson.)

Do you recall what time you arrived at the [26] scene of the accident?

A. Approximately 6:40 a.m.

Q. And how many people were in the Jeep Station Wagon at the time? A. Two.

Q. And what were their names?

A. Ronald Gene Callahan and Mike Ronald Smith.

Q. Did you take the boys out of the station wagon? A. I assisted, yes.

Q. You assisted in taking them out?

A. Yes.

Q. Do you know which one of them was behind the wheel?

A. Well, the vehicle was upside down. They weren't behind the wheel.

Q. I see. Where were the boys taken when they were taken out of the Jeep?

A. They were taken to the South Side Hospital at Mesa, Arizona.

Q. Where did the accident happen with regard to Mesa, Officer?

A. It happened at Mile Post 182.4. At that time it was considered about two and a quarter miles east of Mesa. However, at this time it is in the city limits.

Q. Officer Johnson, during the course of your investigation, did you have occasion to talk to Ronald Michael Smith [27] and Ronald Callahan?

A. Yes; I did.

Q. When did you talk to them?

(Testimony of Harold J. Johnson.)

A. The first real conversation I had with them was at the hospital.

Q. And when was that?

A. That was shortly after. I completed my investigation at the scene.

Q. The same day as the accident?

A. Yes, it was.

Q. Did you have occasion after that to have any further conversations with the boys in the hospital in Mesa?

A. Yes. I stopped by on two or three occasions to visit the boys at the hospital, and to check their condition.

Q. And did you have conversations with them about the accident, and what they were doing at the time during those visits to the hospital later?

A. Yes; I did.

Q. Officer, do you recall who, if anyone else, was present at the time of your conversations with Callahan?

A. No. I wouldn't be able to say for sure who was present at the time I had the conversations. I believe the mother of Mike Smith was there on some occasions. Whether or not she was in the same room when I talked to Callahan, I don't recall. [28]

And there was nurses there on different occasions, but I don't know just who they were.

Q. Did all of these conversations take place within two or three or four days after the accident?

(Testimony of Harold J. Johnson.)

A. Within a period of five or six days, a week, yes, sir.

Q. Now, Officer, will you please tell the Court what Callahan told you as to what the boys were doing at the time of the accident?

Mr. Cavness: If the Court please, insofar as the defendants whom we represent are concerned, we object to this as being hearsay.

The Court: Overruled.

The Witness: State that again, please.

Q. (By Mr. Kaplan): Tell the Court what Ronald Callahan told you in regard to what he and his cousin, Mike Smith, were doing at the time of the accident?

A. Yes. He stated he was the driver of the vehicle, and that they were running away from home, and that he had went east of Mesa some distance out towards Superior and turned around, and was starting back, and that he was very much scared because he had taken the car without permission of his grandfather.

Q. And the accident happened at the place you have already indicated? A. Yes, sir. [29]

Mr. Kaplan: No further questions.

Mr. Cavness: No questions.

Mr. Stuart: I have no questions, your Honor.

The Court: That will be all.

(Witness excused.)

Mr. Kaplan: The plaintiff rests.

Mr. Cavness: If the Court please, at this time

the defendants, Harold Smith, Ruth Smith and Ronald M. Smith, move for judgment in their favor and against the plaintiff.

The Court: I will reserve ruling on that.

Mr. Cavness: May we have, and I hate to irritate the Court, but may we have a five-minute recess.

The Court: All right, we will have five minutes.

(Recess.)

The Court: You may continue.

Mr. Cavness: I would like to call Harold Smith, please.

HAROLD L. SMITH

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cavness:

Q. Would you state your name, please?

A. Harold Smith. [30]

Q. Where do you live? A. Mesa.

Q. You are the father of, or the stepfather of Mike Smith, is that right? A. Yes.

Q. Ronald Callahan is a nephew of yours, is that right? A. That is right.

Q. He lived with you and your family for a period of time in 1957? A. Yes, sir.

Q. How long was that, do you recall?

A. Oh, about three months.

Q. During that period of time he was working for your Dad, I believe, is that right?

(Testimony of Harold L. Smith.)

A. That is right.

Q. And that is Roscoe B. Smith? A. Yes.

Q. You worked for your father as well, I believe? A. Yes; I did.

Q. You ran an agency, or some such?

A. Yes.

Q. This kid had—when I say this kid, I mean Ronald Callahan, he had a Willys Station Wagon that he used in his work, is that right?

A. Yes. [31]

Q. Did he drive it home? A. Yes.

Q. Did he drive it in the evenings for purposes other than his work? A. Yes.

Q. Did you know about that? A. Yes.

Q. Did you tell him that he could not do so?

A. No.

Q. How did he treat that car?

Mr. Kaplan: I object to that, if the Court please, upon the grounds it is immaterial as far as this case is concerned. Unless the grandfather knew about it, it doesn't have any bearing on the issue.

Mr. Cavness: You can't put on three bricks until you put on the first brick.

The Court: Just go ahead and lay another brick.

Q. (By Mr. Cavness): How did he treat that car? A. Explain that, please.

Q. Did he ask permission of anybody, or how did he—

A. Oh, just like it was his own.

Q. Did you ever discuss that with his grandfather, about his use of the car? A. Yes.

(Testimony of Harold L. Smith.)

Q. Did his grandfather ever indicate to you that he [32] wasn't to use it except as his own?

A. Well, no, not in that sense.

Q. Did you ever tell his grandfather that this boy was using the car in the evenings as he saw fit?

Mr. Kaplan: If the Court please, Mr. Cavness is doing all the testifying.

Mr. Cavness: That is leading, and I will withdraw it. I'm sorry.

Mr. Kaplan: What question have you asked that wasn't?

Q. (By Mr. Cavness): Did you ever have a conversation with his grandfather about the use that the boy was making of this car?

A. Yes.

Q. Will you tell us when that was?

A. Not the exact dates.

Q. Approximately.

A. Oh, in January and February.

Q. Do you recall who was present, if anybody, at the time when you had this conversation with him?

A. No, sir; I don't.

Q. Would you now relate the conversation, that is, the substance of it, as best you can remember?

A. I told him that the boy was using the vehicle for his own use. [33]

Q. What was your father's response to that?

A. Oh, he didn't like it.

Q. He didn't like it. What did he say?

A. I don't remember.

(Testimony of Harold L. Smith.)

Q. Was he worried about the gasoline he might be using? A. Oh, yes.

Q. Did he tell you at that time not to allow him to use it? A. No, sir.

Mr. Cavness: That is all.

Cross-Examination

By Mr. Kaplan:

Q. Mr. Smith, if you don't remember what your father said, how do you know he didn't tell you to tell Ronald or not to permit Ronald to use the Jeep truck? A. Well, I remember orders.

Q. You remember orders? A. Yes, sir.

Q. Did you ever have any discussion with Ronald Callahan about what he was or was not to use that Jeep truck for?

A. Yes, sir; I gave him my opinion.

Q. What? A. I did; yes. [34]

Q. You gave him your opinion? A. Yes.

Q. Did you tell him that he was not supposed to use that truck for his own personal use, joy riding, and so forth? A. May I explain?

The Court: All right, answer the question.

The Witness: I told him that he should have good sense in using it if his grandfather let him.

Q. (By Mr. Kaplan): If his grandfather let him? A. Yes.

Q. Did you ever have any discussion with Ronald as to what his grandfather let him use the truck for? A. I don't remember any.

Q. And are you saying now that your father

(Testimony of Harold L. Smith.)

never asked you to supervise Callahan, and never asked you to make sure that he didn't use it for joy riding in the evenings?

Mr. Cavness: That is a multifarious question. Ask one question, but don't ask two at a time.

Mr. Kaplan: If the Court please——

The Court: Overruled. Go ahead.

Mr. Kaplan: Read the question.

(Question read.)

Mr. Cavness: If the Court please, you can see the obvious unfairness of that. This kid was living with this [35] man. Of course, he was undoubtedly asked to supervise him.

The Court: It is semantics, now.

Mr. Cavness: It is not semantics at all.

The Court: Oh, yes. Go ahead. Answer the question.

The Witness: My father did say to me he didn't want a bunch of boys running around all night in it.

Q. (By Mr. Kaplan): In the truck?

A. Yes.

Q. Including Callahan?

A. Well, he had the truck.

Q. He said that to you? A. Yes.

Q. Now, on March 27th, 1957, or March 28th in the early hours, did your son and Ronald Callahan leave home? A. Yes.

Q. When did you first discover they were gone?

A. About 6:30 in the morning.

Q. Is that when you woke up? A. Yes.

(Testimony of Harold L. Smith.)

Q. How did you know they were gone?

A. They weren't there.

Q. I mean, did you go into their room, or something, and find them gone? A. Yes. [36]

Q. Had they asked your permission before they left? A. No.

Q. Had they told you they were going?

A. No.

Mr. Kaplan: No further questions.

Mr. Stuart: No questions.

Redirect Examination

By Mr. Cavness:

Q. You were supposed to supervise this kid as a child in your home, is that right, this Callahan kid? A. Yes, because he was my nephew.

Q. And he was living with you? A. Yes.

Q. And you were the adult in charge, is that right? A. Yes.

Q. Did he use the truck in the evenings as he saw fit? A. Yes, sir.

Q. And did you advise your father of that fact?

A. Yes, sir.

Q. Were you ever told, beyond the fact of "Don't let a bunch of boys run around in that truck," were you ever told anything beyond that by your father, as to the use of that truck?

A. No, sir. [37]

Mr. Cavness: That is all.

Mr. Kaplan: No further questions.

Mr. Stuart: No questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Cavness: That is all we have, your Honor.

The Court: Anything else?

Mr. Stuart: I would like the Court to permit me to put on testimony at some later time, as far as my attorney's fee is concerned, as alleged in my counterclaim. At the time the Court makes a decision, I will submit briefs on it, if the Court wishes.

The Court: All right.

Mr. Cavness: We will agree that that may be put on later.

The Court: Very well.

Mr. Cavness: Mr. Kaplan, is it all right with you?

Mr. Kaplan: Yes.

The Court: Now, there is nothing further?

Mr. Kaplan: We have nothing further.

Mr. Cavness: Your Honor, I would like to suggest that the law in this matter might be found in——

The Court: You just put it in a Memorandum.

Mr. Cavness: You want me to write it down?

The Court: Yes; you write it down. [38]

Mr. Kaplan: I have submitted a trial brief to the Court for the assistance of the Court.

Mr. Cavness: I haven't seen it.

Mr. Kaplan: No, because trial briefs don't have to be submitted to opposing counsel.

The Court: I am trying to find out whether you want to file an additional memorandum.

Mr. Kaplan: We can file one in more complete form, adverting to the testimony now.

Mr. Cavness: May Mr. Kaplan have ten days, and may I have ten days after that?

Mr. Kaplan: I would like to have more than that.

The Court: All right, twenty. And then you may have ten. [39]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 21st of November, A.D. 1958.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed December 4, 1958.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States
for the District of Arizona

No. Civ. 2675—Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
dba Swan Cleaners; RONALD G. CALLA-
HAN, a Minor; HAROLD L. SMITH and
RUTH M. SMITH, His Wife; RONALD M.
SMITH, a Minor; JOHN DOE, JANE DOE
and BLACK CORPORATION,

Defendants.

DEPOSITION OF RONALD G. CALLAHAN
taken at 1:40 o'clock p.m., on February 25, 1958,
in the law offices of Moore & Romley, 811 First Na-
tional Bank Building, Phoenix, Arizona, before
William H. Morris, a Notary Public in and for the
County of Maricopa, State of Arizona.

The plaintiff was represented by its attorneys,
Moore & Romley, by Mr. Jarril F. Kaplan.

Defendants Roscoe B. Smith and Ida Smith were
represented by their attorneys, Gorodezky, Mitchell
& Stuart, by Mr. Eli Gorodezky.

Defendant Ronald G. Callahan was present, to-

(Deposition of Ronald G. Callahan.)

gether with his mother, Mrs. Lois Callahan, and was not represented by counsel.

Stipulation

It Is Stipulated by and between counsel for the respective parties hereto that the deposition of Ronald Callahan may be taken as an adverse party for the purposes of discovery at this time and place pursuant to notice before William H. Morris, a Notary Public in and for the County of Maricopa, State of Arizona.

It Is Further Stipulated that all objections, except as to the form of the questions propounded, are reserved until the time of trial.

It Is Further Stipulated that the reading over and signing of the deposition by the witness is waived, and notice of filing and other formalities required by law for the taking and returning of same deposition are waived. [2*]

RONALD G. CALLAHAN

called as an adverse party for cross-examination herein, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Kaplan:

Q. Ronald, your full name is Ronald Callahan?

A. Yes, sir. Ronald G. Callahan.

Q. Ronald G. How old are you, Ronald?

A. 17.

Q. Where do you live? A. California.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Ronald G. Callahan.)

Q. What part? A. Lakewood.

Q. Is that near Los Angeles?

A. It is closer to Long Beach.

Q. Ronald, you were here this morning with your mother when the deposition of Mr. R. B. Smith was taken, is that correct? A. Yes.

Q. Mr. Smith is your grandfather?

A. Yes.

Q. From sitting in this morning, you know what a deposition is now? [3] A. Yes.

Q. I am going to ask you questions and you are expected to answer those questions truthfully, having in mind that you are under oath. You understand that? A. Yes; I do.

Q. Now, Ronald, my purpose here this afternoon is to find out from you the true facts of what happened concerning this accident in which you were involved on March the 28, 1957. I do not have as my purpose to trick you in any way. I am merely trying to find out from you what happened. I wasn't there. Now, if I ask you any question which you do not understand fully, please stop me and ask me to rephrase the question or restate the question. Be sure that you understand my question before you answer it. If you don't understand the question, please stop me and tell me so. I will rephrase it until you understand it. Is that all right?

A. Fine. Thank you.

Q. Ronald, you live in Lakewood with your parents, is that correct? A. Yes, sir; I do.

Q. And your parents' names are what?

(Deposition of Ronald G. Callahan.)

A. Ralph Callahan and Lois Callahan. [4]

Q. Your mother, Lois Callahan, is the daughter of Mr. R. B. Smith? A. Yes.

Q. Ronald, in January, 1957, did you have occasion to come to Arizona?

A. Yes; I did. I think—I am pretty sure it was January.

Q. And what was the purpose of your coming to Arizona at that time?

A. To work for my grandfather.

Q. Were you in school at that time?

A. No.

Q. Had you finished school?

A. No; I hadn't.

Q. Had you just decided to quit school and come to work? A. Yes.

Q. I see. Now, in January, then, you came to Arizona and went to work for your grandfather, R. B. Smith? A. That is right.

Q. In his business, Swan Cleaners?

A. Yes.

Q. And with whom did you live while you were in Arizona?

A. With my uncle and aunt. [5]

Q. And what are their names?

A. Harold Smith and Ruth Smith.

Q. Where is their home? A. Right now?

Q. Where was their home in March of 1957?

A. Gee, I don't know the address. It was on 13th Place here in Phoenix. But I don't know the address.

(Deposition of Ronald G. Callahan.)

Q. Did you have a separate bedroom all to yourself? A. No.

Q. With whom did you stay while in the Smith home? A. With my cousin.

Q. And what is his name?

A. Michael. Ronald Michael.

Q. Ronald Michael; he is commonly referred to as Mike or Michael, is that right?

A. Yes, sir.

Q. Did you sleep in the same bed or did you have twin beds in the room or what?

A. Well, it was a couch in the living room. We slept together on it.

Q. You slept together on a couch in the living room? A. Yes, sir. [6]

Q. I see, and then the Smiths, of course, had their bedroom? A. Yes.

Q. Ronald, did you have the job with your grandfather when you came here in January or did you come to Arizona to seek employment with your grandfather?

A. No. I had it before I came.

Q. You had discussed going to work with him before you came over? A. Yes.

Q. Had he been in California or had you discussed it by correspondence or do you recall?

A. Gosh, it seems like he had come back and I asked him then, but I don't know. I couldn't really say yes or no.

Q. Now, what arrangement did you make with your grandfather for working for him? That is,

(Deposition of Ronald G. Callahan.)

what hours you were to work; what you were to do; how much you were to receive or did you have any such arrangement when you first came over?

A. Well, when I first came down then, it was the agreement he was just going to teach me the business, to do the different (pause).

Q. Parts in the business?

A. Things. Yes, sir. [7]

Q. All right. There was no discussion of hours or salary or anything of that nature at that time?

A. No.

Q. When you came to Arizona, then, and did go to work for your grandfather, what job did you have?

A. Oh, whatever he could have open for me. I did the agencies for awhile, going out to Tempe and Mesa. And, oh, "bag" clothes and steam coats and just all sorts of things, learning all of it.

Q. Learning every angle of the business?

A. Yes, sir.

Q. Now, I am going to refer in my questions, Ronald, to the period of time between January in 1957 when you first went to work for your grandfather and March the 28th of 1957 when you were involved in this accident with the Jeep station wagon.

A. Yes.

Q. Now, between that period of time or during that period of time, what job did you do for your grandfather or what jobs did you do?

A. Well, mostly, route, wholesale customers, agencies.

(Deposition of Ronald G. Callahan.)

Q. Agency customers? [8] A. Yes.

Q. Now, those agency customers would receive clothes from different people and would turn the clothes over to your grandfather's business for cleaning and laundry and your grandfather would return the clothes then after they had been cleaned or laundried to the agency station who would deliver the clothes to the ultimate customer, is that right? A. Yes, sir.

Q. When you say, "You did the agencies," do you mean that you picked up the clothes that needed to be cleaned and laundried from the agencies and then after they had been cleaned and laundried you delivered them back to the agencies?

A. Yes.

Q. And in the process of picking up and delivering from the agencies, if they happened to owe any money to your grandfather, would you also take the money back to the plant with you?

A. Yes. That is right.

Q. Now, where were these agencies located between January and March that you serviced?

A. You mean, the street or just here——

Q. No. Just where, generally?

A. Well, most of them was here in town. [9]

Q. Here in Phoenix?

A. Yes, sir. And there was three—there was two in Tempe and at that time one in Mesa.

Q. Who was the agent in Mesa?

A. You mean, her name?

Q. If you know.

(Deposition of Ronald G. Callahan.)

A. Her name was Van Winkle.

Q. Do you know her first name?

A. Dotty. I don't know—I think that is her nick name, but I don't know.

Q. Now, did you make pick-ups of clothes from and deliveries of clothes to Dotty Van Winkle in Mesa during the period of time, January of '57 to March 28th of '57?

A. I believe I did, yes.

Q. Do you know on how many occasions you had to make such deliveries?

A. Oh, golly. I don't remember what months it was. That's the only thing that's got me, but I went out there quite a bit. Twice a day.

Q. Did she go out of business before March 28, 1957, when you had your accident?

A. Yes; she did.

Q. Do you know how long before that she had gone out of business?

A. Oh, I imagine about two or possibly [10] four weeks.

Q. So for two or four weeks prior to the accident there were no agencies for your grandfather in Mesa?

A. No.

Q. That is correct?

A. That is right.

Q. Now, Ronald, when did you first drive the Willys Jeep station wagon which you were driving at the time of the accident?

A. You mean, the first time I ever drove it?

Q. Yes.

A. Gosh, I can't say.

(Deposition of Ronald G. Callahan.)

Q. Was it when you came over here to work for your grandfather in January?

A. That is the first time I ever drove it.

Q. I see. Now, before you ever drove the Jeep station wagon, did you ever have any discussion with your grandfather about taking the station wagon? A. No. I don't believe I did.

Q. What occasion did you have to first drive it?

A. Well, when he first started me out in the agencies, I used it first.

Q. Did you use it pursuant to your [11] grandfather's instructions? I mean, did he say, "Ronald, take the Jeep and go out and service the agencies," or what?

A. Well, at first he did, yes, and then it was just normal. I would take it and go to the agencies.

Q. That became your regular duty and you just used the truck as part of your regular duties there working for your grandfather? A. Yes.

Q. Now, what were your hours of employment during all the time you worked for your grandfather between January and March 28 of '57?

A. Oh, gosh, that would be hard to answer.

Q. Let me put it this way: You were here when your grandfather testified this morning?

A. Yes.

Q. You heard him say that it was your job to first check in with the plant or the office in the morning and then make your calls on the agencies and then come back to the plant after making your calls on the agencies; then, go back to the agencies

(Deposition of Ronald G. Callahan.)

with the cleaning and laundry after it had been serviced in the afternoon. Is that correct?

A. Yes. [12]

Q. Was your grandfather also correct when he stated that you very rarely had occasion to leave the plant before 9:00 o'clock in the morning?

A. Very rarely. That was right.

Q. That is right. Now, will you state what hours you usually arrived at the plant?

A. Oh, usually around 8:30 or sometimes 8:00, quarter till nine.

Q. Am I correct in stating that at no time did you have occasion to check into the plant before 8:00 o'clock in the morning?

A. No.

Q. That is correct?

A. That is right.

Q. At no time did you have any occasion to be working for your grandfather or doing anything for your grandfather before 8:00 o'clock in the morning?

A. That is right.

Q. Now, Ronald, do you recall how long after you began working for your grandfather that he permitted you to take the Jeep truck home at night and then drive it back to work in the morning?

A. Well, at the time I worked for him, my uncle worked at the plant, too. And I just rode [13] with him, but after he took over another agency for us, I had no way to get back and forth to work. So, then he let me take it.

Q. I see. Now, how far was it at that time from your uncle's house to the plant?

A. Well, he lived on 13th Place and it is on 32nd.

(Deposition of Ronald G. Callahan.)

Q. Street?

A. It was quite a ways. It was too far to walk.

Q. Your uncle lived on 13th Place and the plant was on 32nd Street? A. Yes.

Q. Here in Phoenix. Now, you say that when you first went to work for your grandfather in January, your uncle also worked for your grandfather at the plant? A. Yes, sir.

Q. And you living with your uncle, you naturally rode to work with him in the morning and rode back in the evenings? A. Yes, I did.

Q. Then, your uncle took over an agency for your grandfather, I think you said, and where was that agency located?

A. Well, it was on 12th Street right above [14] where he lived.

Q. Right close to where your uncle lived?

A. Close, yes.

Q. When your uncle took over the agency and no longer went back and forth to the plant, did you then ask your grandfather to let you take the truck home at night and bring it back in the morning?

A. Gosh, I don't know how I ever started taking it home. I believe he suggested I take it home.

Q. Okay. Now, when he made the suggestion, did he suggest that the purpose of your taking it home was so that you would have transportation back and forth to and from work?

A. Yes. That is right.

(Deposition of Ronald G. Callahan.)

Q. That was the only reason for letting you take the Jeep with you, is that correct?

A. Yes, sir. Back and forth.

Q. To get back and forth to work?

A. Yes.

Q. Did you understand at that time that the Jeep was not furnished to you as a personal automobile to be used by you for any personal reasons that you wanted to use it for?

A. Well, like he said: I took it for granted [15] I could go to the drug store or something like that with it.

Q. You could run errands for your uncle?

A. But not just to take it and run around town in, no. I knew that.

Q. I see. All right. Now, did you know that your grandfather had told your uncle or instructed your uncle that he was to give you permission when you wanted to use the truck for a personal reason? That is, go to a movie or take out a date or something of that nature?

A. No, sir.

Q. You didn't know it?

A. I didn't know it.

Q. Had you ever asked your uncle for permission to use the truck for any personal reasons before the accident?

A. No, not to use the truck.

Q. Well, had you ever asked his permission to use any vehicle?

A. Oh, I used his car occasionally. I asked him for that or I asked him if he minded if I went.

(Deposition of Ronald G. Callahan.)

Q. You asked him if he minded if you went some place? A. Yes. [16]

Q. On a personal errand? A. Yes.

Q. And did you mean when you asked your uncle if he minded if you went, did you mean to imply to your uncle or tell your uncle that you meant to take the Jeep station wagon when you——

A. (Interrupting): Yes. I think—it was my understanding that he knew—that is the only thing I had to take, was the Jeep.

Q. All right. Well, then, you did ask your uncle permission when you wanted to use the Jeep station wagon for a personal reason, outside of an errand for the family?

A. Well, not to use the truck, I didn't ask him.

Q. Well, what did you do?

A. Well, I would usually say, like I was going to go up to the drug store to get a magazine or something. I would say, "Do you care if I run up to the store?" I didn't say, "Can I take the truck?" I just said, "Can I go up to the drug store and get some books or something?"

Q. Well, by that, he understood that you were going to take the truck?

A. Yes; I thought so.

Q. Did you commonly ask your uncle for [17] permission to go out in the evening? Let's put it that way.

A. I very seldom ever went out in the evenings. But when I did, yes.

Q. When you did go out in the evenings, you

(Deposition of Ronald G. Callahan.)

did ask your uncle's permission? A. Yes.

Q. Now, how often did you use the Willys Jeep station wagon for purely personal reasons? That is, either to go to a movie or ride around town or go out with a bunch of the fellows or—I don't know whether you dated girls or not before the accident of March 28, 1957.

A. Well, occasionally, I would go up the street to a milkshake stand and get some milkshakes and once in a while I would go back over to the plant in the evening time.

Q. For work?

A. No. Just to see if there was something I could do. And like he said, occasionally, I did take it to a drive-in show. That is about all I ever used it for.

Q. I see. When you did take the vehicle out in the evenings, then, you did ask your uncle's permission to go wherever you were going?

A. Yes. Usually, I did. [18]

Q. And did you understand, Ronald, that either you were not to go out at all or in any event you were not to use the Jeep station wagon as a personal automobile to go wherever you wanted to go but were to use it only for the purpose of driving back and forth to and from work, unless you either had your grandfather's permission or your uncle's permission to go out?

A. Well, any time I would plan on using the Jeep for a show or something, I usually asked my grandfather if I could use it before I took it any-

(Deposition of Ronald G. Callahan.)

where. But, like if I went up to the drug store or something. He wasn't near so I could ask him, "Can I use your truck?" It was my understanding that I could use it for something like that.

Q. I see. Now, Ronald, either in the evening, late in the evening of March 27 or early in the morning of March 28, you and Michael got into the Jeep and went somewhere? A. Yes.

Q. Will you please tell me what occurred that first made you decide to take the Jeep that evening or morning, whichever it was?

A. Well, he had said that he didn't want to stay around the house. [19]

Q. Who was that? A. Mike. Michael.

Q. Did he give you any reason for that?

A. Well, he and a couple of boy friends of his, I think, were planning to run off that night. And I had had two keys to the truck all the time. They was both together, and I knew—I knew there was one missing because I couldn't find it. But I didn't—I never thought anything about it. And come to find out he had it. I don't know how he got it, but he had it.

Q. Now, Ronald, when did this conversation take place of this incident?

A. Well, the night before the wreck, I guess.

Q. The night before?

A. Well, the night when we left. I don't know what night, Monday, Tuesday, whatever night it was. Thursday, I think, and it was that night when I come home.

(Deposition of Ronald G. Callahan.)

Q. Was it late at night?

A. Yes, it was. My aunt had been down and I took her to the carnival that night.

Q. When you got home, why, Michael told you that he and some fellows were planning to run off and he didn't want to stay around the house?

A. No. He didn't tell me that. At first. [20] When I came home he was awake. Everybody else was in bed and he said something about he had to go outside and get some bicycle nuts and bolts, or something he left out on the lawn so they wouldn't rust. I thought it was funny. It was late at night and he went on out. He was out for about, oh, 20 or 30 minutes. So I went out, and I wondered what happened to him, and he was setting in the Jeep then. When he saw me come out, he got out and came around the truck and come over there where I was. I asked him what he was doing and he says, "Nothing." So, when he came in—I don't remember whether he went back to bed or what. I don't think he did. So I went out to the jeep to see if he put something in it or what. Oh, he had a little .22 rifle there, an air gun or something. I saw it laying across the front seat. I came in and I asked him about it. Then is when he told me.

Q. What did he tell you about it?

A. He told me a couple of kids and him were planning on running off that night and taking the Jeep, the truck, with them. And so I tried to talk him out of it. He said, no, he was determined to go. So, I says, "Well, why don't you just talk to

(Deposition of Ronald G. Callahan.)

Bill," my uncle, his Dad, "first about it and [21] see if you can't straighten things out, whatever is wrong?" And he said he didn't want to stay there that night. So, I said, well, I said, "We could go out and just ride around till morning and then I will call your Dad over to the agency he was running and have him meet you somewhere, and then I can go on to work and you can talk to him." So, I wrote a note. I don't remember what I said now. Something about that I told him Mike was with me and I would call him at 7:00 or 8:00, whatever it was. And I was driving around. I went out to Mesa, that way, so I turned around and was on the way back in to get to a phone. It was getting near time. I was wanting to get back in Phoenix so I could call him from there, when the accident happened.

Q. How did the accident happen?

A. I don't know.

Q. Do you recall falling asleep?

A. I think I fell asleep. That is what they told me; I fell asleep at the wheel.

Q. How long had you been riding around, Ronald?

A. Oh, gosh. I really don't know. Probably—oh, I imagine it was about 2:00, I guess, when we left. [22]

Q. 2:00 in the morning?

A. I think so. It would be hard to say because I really don't know.

Q. You had been riding around for a few hours, anyhow, when the accident happened?

(Deposition of Ronald G. Callahan.)

A. Yes. I had stopped once, though, and got coffee in Tempe and set there for a little bit.

Q. Where was Michael in the truck during this time?

A. Well, he was up with me and he says he is tired. It was cold out. So we took a blanket. I don't know what all we took, a blanket and a pillow, I think. And he took the blanket because it would be cold out and so I put my coat on. And when we was out there, he said he was going to lay down. All right. In a Jeep the seat will push forward on the rider side. So I pushed it forward and he laid down there.

Q. The only purpose you had in riding around all these hours prior to the accident and in taking the Jeep for that, was to keep Michael from running away from home with these other fellows and taking the Jeep with him, is that right?

A. Yes.

Q. You intended to keep him busy until morning, when you could get to a phone and call his [23] father and have him talk it out with his father?

A. Yes, sir. That is right.

Q. You were not, at the time you took the Jeep or at the time you were doing all this riding around prior to the accident, on any business for your grandfather, were you?

A. No. None.

Q. You knew when you took the Jeep that you were driving it around without your grandfather's or your uncle's permission?

A. Yes, that night I did.

(Deposition of Ronald G. Callahan.)

Q. That night. You knew that you were not supposed to use the Jeep for that purpose?

A. Yes; for that purpose; just to ride around in.

Q. Now, after the accident where were you taken, do you know?

A. Southside District Hospital, Mesa.

Q. And were you knocked unconscious?

A. I don't remember anything about it. I think I was.

Q. When you awoke, was there anyone else in the hospital room with you?

A. Well, the first thing I remember was I thought it was a little room and everybody was asking a bunch of questions. I don't know who they [24] was asking. They was looking at me, so I presume they was asking me, but I don't remember what I told them. I imagine they was trying to find out who to call.

Q. Was any of your family present when you woke up?

A. Well, after they started—when they called them, my aunt was there from California, my mother's sister, grandfather's other daughter and my uncle, Harold Smith, and his wife was at the hospital. They wasn't with me then at the time.

Q. Do you recall when it was that you first spoke to anyone about the accident?

A. In the hospital, you mean?

Q. Yes. A. No.

Q. Do you recall who it was that you first spoke to about the accident?

(Deposition of Ronald G. Callahan.)

A. I don't believe I spoke to anybody in the hospital about it. I don't remember if I did.

Q. You don't recall your Uncle Harold or your Aunt Ruth asking you any questions about what had happened or what was going on or anything like that? A. No. I sure don't.

Q. How long were you in the hospital? [25]

A. I think, three days.

Q. Did your mother come out from California while you were in the hospital?

A. Yes. I believe they came out that night or the next day, my mother and father both.

Q. Ronald, do you recall telling either your grandfather or your aunt and your uncle or your mother or anybody what you have told me today in regard to how the accident happened and what you were doing at the time of the accident?

A. Well, I told my mother—as soon as I got back, they took me back to California. I told her right away, and I told my mother's mother back there, my grandmother, I told her.

Q. How about your grandfather here; did you ever tell him about it?

A. No. I never saw him.

Q. How about your aunt and your uncle? Did you ever tell them? A. No.

Q. Was Michael in the same room with you in the hospital? A. Yes, he was.

Q. And did he regain consciousness during the time you were in the hospital?

A. I believe he did a couple of times. [26]

(Deposition of Ronald G. Callahan.)

Q. Do you recall his having told his mother or father or your grandfather while he was in the hospital, what happened?

A. No. I don't believe he did.

Q. Do you know whether or not Michael has ever told his parents what happened?

A. Well, myself, I don't know. My uncle told me he did.

Q. Your Uncle Harold? A. Yes.

Q. When did your Uncle Harold tell you that?

A. I believe it was just yesterday, I believe, he told me.

Q. And what did your Uncle Harold tell you that Mike had told him?

A. Well, he told me that Mike told him that he was going to run off before his report card came out, but he wasn't going to run off that night.

Q. What did Mike tell him as to why you all were out driving around?

A. I don't know. He didn't tell me that.

Q. I see. Did Mike ever mention anything to you about having trouble in school with his report card or anything like that?

A. I don't believe he did, no. [27]

Q. He didn't tell you why he and these other fellows were planning to run off?

A. Well, are you speaking about that night?

Q. Yes.

A. Well, he said that he didn't like it, and I don't believe he ever mentioned about these other fellows, why they was going.

(Deposition of Ronald G. Callahan.)

Q. He just didn't want to stay around home?

A. Yes.

Q. And because Michael was fidgety and nervous and about to run off, you decided that the best thing to do was to keep him otherwise occupied and ride him around and see if you could get him calmed down, is that right?

A. Yes. I didn't want him to take the Jeep and go out and get killed in it.

Q. And I think you previously said that you noticed that evening, that one of the keys to the Jeep was missing?

A. No. I had noticed it earlier.

Q. You had noticed that earlier?

A. Yes. But, I mean—oh, about a week before, I think. I can't be sure of that. But I didn't think too much about it. I just figured I lost it.

Q. When did you find out that Mike had the [28] other key?

A. Well, I didn't really know he had it. But, when I saw he had put a little gun in the car, I just started putting two and two together and I asked him and he did.

Q. In other words, the night before you and Michael took the truck and went out riding, that was when you discovered that he had the other key?

A. No. It was the night we left, or morning, or whenever it was.

Q. Yes; the night of the morning?

A. Yes. That same time, yes.

(Deposition of Ronald G. Callahan.)

Q. And he was intending to use that key to take the Jeep and run off?

A. That is what he said.

Q. Now, again, just so that this is absolutely clear: You were not at the time of the accident on any business of any kind for your grandfather? That is correct? A. That is correct.

Q. And you did not have permission to use the truck at that time——

A. (Interrupting): No.

Q. (Continuing): ——or place?

A. He didn't tell me to take it.

Q. You knew, that before using the truck at [29] that time and place and in the manner in which you did that evening, you were supposed to get either your grandfather's permission or your uncle's permission, is that correct?

A. To use the truck, you mean?

Q. Yes.

A. I didn't know I was to have his permission to use the truck.

Q. I mean, you knew that before taking the Jeep truck with Mike and going out that evening, riding around, going over to Mesa the way you did, that before doing that you were either supposed to have your grandfather's permission or your uncle's permission? A. Yes.

Q. And then you knew that you were using the Jeep at that time totally without permission?

A. Yes, sir. I did.

Mr. Kaplan: I have no further questions.

(Deposition of Ronald G. Callahan.)

Cross-Examination

By Mr. Gorodezky:

Q. Ronald, do you know whether Mike had had any difficulty at home, a spanking or a little trouble; something that might make him feel like running off? Do you know of anything of that [30] nature that might prompt him to want to run off?

A. Oh, my gosh. I couldn't answer that.

Q. Okay. You don't know whether he had a spanking or whether or not he was threatened or going to get a spanking or didn't get down to work for school or anything like that that prompted his feeling?

A. No. I believe he said he was afraid of his report card. I believe that is what he said.

Mr. Gorodezky: That is all, sir. Thank you.

(Signature waived.)

[Endorsed]: Filed February 28, 1958. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of

said Court, including the records in the case of United States Fidelity and Guaranty Company, a corporation, Plaintiff, vs. Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Ronald G. Callahan, a minor, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, and Dan Cracchiolo, guardian ad litem of Ronald Callahan, a minor, numbered Civ-2675 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of minute and civil docket entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Complaint.
2. Answer of Defendants Roscoe B. Smith and Ida Smith, d/b/a Swan Cleaners; Harold L. Smith and Ruth M. Smith, and Ronald M. Smith.
3. Answer of defendant Ronald G. Callahan.
4. Stipulation, Consent and Order Appointing Guardian Ad Litem.
5. Motion to Withdraw of Wm. P. Lutfy and Notice Thereof.

6. Minute entry of January 6, 1958, (order allowing counsel to withdraw).

7. Deposition of Ronald G. Callahan (Plaintiff's Exhibit No. 2 in evidence).

8. Deposition of Roscoe B. Smith, filed February 28, 1958.

9. Minute entry of March 21, 1958 (pretrial conference).

10. Counterclaim of Defendants Roscoe B. Smith and Ida Smith.

11. Plaintiff's Reply to Counterclaim of Roscoe B. Smith and Ida Smith.

12. Stipulation and Order of September 17, 1958.

13. Counterclaim of Defendants Harold L. Smith, Ruth M. Smith and Ronald G. Smith.

14. Deposition of Roscoe B. Smith, filed November 7, 1958.

15. Minute entry of November 12, 1958, (proceedings of trial).

16. Plaintiff's Reply to Counterclaim of Harold L. Smith, et al.

17. Reporter's Transcript of Proceedings.

18. Minute entry of February 27, 1959, (order for judgment).

19. Defendants' Proposed Findings of Fact and Conclusions of Law (being the same document as described under item 22 below).

20. Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law, Request for Additional Findings and Conclusions, and Request for Hearing.

21. Minute entry of April 23, 1959, (order on findings).
22. Findings of Fact and Conclusions of Law.
23. Judgment, entered, filed and docketed April 23, 1959.
24. Notice of Appeal.
25. Cost Bond on Appeal.
26. Designation of Record on Appeal.
27. Order Extending Time to File Record on Appeal and Docket Appeal.
28. Civil Docket Entries.

I further certify that all original exhibits are transmitted herewith as a part of this record on appeal, to wit:

Plaintiff's Exhibit No. 1 in evidence (Insurance Policy).

Plaintiff's Exhibit No. 2 in evidence (Deposition of Ronald G. Callahan).

Witness my hand and the seal of said Court this 3rd day of July, 1959.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the United States Court of Appeals
For the Ninth Circuit

Case No. 16536

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a/ SWAN CLEANERS, RONALD G.
CALLAHAN, a Minor, HAROLD L. SMITH
and RUTH M. SMITH, His Wife, and RON-
ALD M. SMITH, a Minor,

Appellees.

STATEMENT OF POINTS ON APPEAL

The Points upon which Appellant intends to rely on this Appeal are as follows:

1. Finding of Fact Numbered 5 is erroneous in that it fails accurately to state the provisions of the insurance policy in question which are set forth in Plaintiff's Exhibit No. 1 in evidence.

2. Finding of Fact Numbered 6 is contrary to the undisputed facts, is a conclusion of law and is erroneous in that there is no sufficient evidence to support said finding, and it constitutes an unwarranted extension of the terms of the insurance agreement.

3. Conclusion of Law Numbered 2 is contrary to law, is not supported by the facts or the evidence and is insufficient to sustain the judgment.

4. The Judgment is not justified by the facts or the evidence and is contrary to law.

Dated at Phoenix, Arizona, this 11th day of July, 1959.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 14, 1959.

[Endorsed]: No. 16536. United States Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a Corporation, Appellant, vs. Roscoe B. Smith and Ida Smith, Ronald G. Callahan, Harold L. Smith and Ruth Smith, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed July 6, 1959.

Docketed: July 14, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

